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14 UNITED STATES DISTRICT COURT
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16 NORTHERN DISTRICT OF CALIFORNIA
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18 SAN FRANCISCO DIVISION

19
20 UNITED STATES OF AMERICA,) No. CR 16-00440 WHA
21 Plaintiff,)
22 v.) UNITED STATES' NOTICE OF EXPERT
23) TESTIMONY OF FBI SPECIAL AGENT JEFFREY
24) S. MILLER
25 YEVGENIY ALEXANDROVICH NIKULIN,) Trial: March 9, 2020
26 Defendant.) Pretrial Conference: February 26, 2020
27) Time: 2:00 p.m.
28) Courtroom No. 12
29
30)

31
32 **Introduction**

33 The United States hereby provides notice of its intent to introduce expert testimony at trial in its
34 case in chief from Federal Bureau of Investigation Special Agent Jeffrey S. Miller, under FRE Rules
35 702, 703, and/or 705 of the Federal Rules of Evidence. This disclosure is made pursuant to Rule
36 16(a)(1)(G) of the Federal Rules of Criminal Procedure. The United States also provides notice of its
37 intent to produce lay opinion and non-expert testimony in its case-in-chief from Special Agent Miller,
38 described below, under FRE Rule 701. Although some of the testimony elicited from this witness is
39 properly characterized as lay witness testimony, and not expert opinion, the government, in an
40 abundance of caution, provides notice of the witnesses' testimony and qualifications, to the extent that

41 U.S. EXPERT NOTICE RE FBI SPECIAL AGENT MILLER
42 CR 16-00440 WHA

1 the Court considers all of this testimony to be expert testimony.¹

2 **Witness' Qualifications**

3 Special Agent Miller has been employed as a special agent with the FBI assigned to the
 4 investigation of cyber-crime since May 2010. His training included attending the twenty-one week FBI
 5 new agent basic training during which he received instruction on various aspects of federal
 6 investigations. Since graduating from the FBI Academy, and being assigned to the San Francisco Field
 7 Office, Special Agent Miller has been assigned to investigate high technology and cybercrime offenses
 8 and has been involved in investigations of computer-related offenses, including computer intrusions,
 9 trafficking in unauthorized access devices, identity theft, wire fraud, internet extortion, and other
 10 criminal matters.

11 Prior to joining the FBI, Special Agent Miller obtained a Bachelor of Science degree in
 12 Computer Technology with an emphasis on networking from Purdue University in West Lafayette,
 13 Indiana. As an FBI agent, his continued education on computer-related topics has included the
 14 completion of courses at the SANS Institute including Introduction to Information Security, Security
 15 Essentials, and Mac [Apple] Forensics Analysis. Special Agent Miller is also a certified FBI Digital
 16 Extraction Technician ("DEXT"), which requires completion of a two-week training course in the
 17 imaging and review of electronic evidence.

18 **Computer Forensic Testimony**

19 Special Agent Miller is expected to testify that he reviewed evidence extracted from a forensic
 20 image of a computer obtained through an MLAT request to Ukraine (YN014838), as described in the
 21 Forensic Toolkit ("FTK") reports produced at YN014111. Special Agent Miller is expected to testify
 22 regarding the processes used to extract and review evidence through FTK. This testimony may include a
 23 description of the data; where the data was found; if available, the date the data was created; and, if
 24

25 ¹ The Ninth Circuit has held that many observations, even by law enforcement personnel, which
 26 are common enough yet still require a limited amount of expertise, can properly be characterized as lay
 27 opinion. *See United States v. Von Willie*, 59 F.3d 922, 929 (9th Cir. 1995) (police officer's testimony
 28 regarding nexus between drug trafficking and possession of weapons was admissible as lay witness
 opinion; "these observations are common enough and require such a limited amount of expertise, if any,
 that they can, indeed, be deemed lay witness opinion."); *see also* Fed. R. Evid. 701 (lay witness
 testimony "in the form of opinions or inferences" permitted when "helpful to a clear understanding of
 the witness' testimony or the determination of a fact in issue").

1 available, the date the data was last altered or accessed. In testifying about his review of the image,
2 Special Agent Miller may discuss the hardware and software involved in forensic review and analysis.

3 The bases and reasons for this part of Special Agent Miller's testimony are his education,
4 training, experience, and familiarity with computers, computer forensic extraction, and forensic review.
5 The bases and reasons for his opinions also include the analysis of the evidence seized in the criminal
6 investigation of this case and may include the reports of law enforcement agents involved in this
7 investigation.

8 The government believes that this testimony will be more "fact" testimony regarding the
9 existence of or the location of certain data on the computer image or the regular operation of the FTK
10 software, rather than "expert" testimony, regarding the details of the computer's functioning or of the
11 forensic extraction process. The witness's expertise will only be offered to the extent necessary to
12 establish that his technical and specialized knowledge allowed him to process and examine data
13 contained in the image.

14 **Testimony Regarding the Market for and Uses of Stolen Online Credentials**

15 Special Agent Miller also expected to testify regarding the online market for stolen website
16 credentials and the uses that criminals have for such stolen credentials. He will testify that there is a
17 robust underground market for user names and passwords, including encrypted passwords. This
18 testimony will include a description of the roles that various individuals play in the market. The
19 testimony is also anticipated to include a description of the process of decrypting stolen credentials for
20 use or sale, including the meaning of the term "bruter," which is someone who uses a "brute-force
21 attack" to decrypt data. Special Agent Miller will also testify regarding the typical purchase prices for
22 different types of stolen credentials in 2012. He will testify about how buyers and sellers of stolen
23 credentials transfer payment, including Western Union, and about the role of middlemen in enabling
24 such transactions. Special Agent Miller will also testify about the uses for stolen credentials, including
25 "spamming," that is, using accounts compromised through stolen credentials to send unwanted
26 commercial email.

27 The bases and reasons for this part of Special Agent Miller's testimony are his training,
28 experience, and familiarity with computer intrusions and the sales of credentials stolen in such

1 intrusions. The bases and reasons for his opinions also include the analysis of the evidence seized in the
2 criminal investigation of this case and may include the reports of law enforcement agents involved in
3 this investigation.

4 The government believes that some of all of this testimony will be fact testimony and lay opinion
5 rather than “expert” testimony. The witness’s expertise will only be offered to the extent that the
6 witness’ technical and specialized knowledge allowed him to process and examine the image.

7 **Bifurcation of Testimony**

8 Because Special Agent Miller is the lead case agent and expects to testify regarding the
9 investigation more generally, the government will bifurcate his testimony to distinguish between the
10 non-expert and expert portions of his testimony. The government will also offer 9th Circuit Model
11 Criminal Jury Instruction 4.14 (Opinion Evidence, Expert Witness) as a limiting instruction at the time
12 any expert testimony by Special Agent Miller is received.

13 The Government hereby reserves the right to supplement this Notice as warranted. Pursuant to
14 Rule 16(b)(1)(C), the Government requests that the defendant disclose any testimony that he intends to
15 use under Rules 702, 703, and/or 705 of the Federal Rules of Evidence as evidence at trial.

16
17 DATED: December 4, 2019

Respectfully submitted,

18 DAVID L. ANDERSON
19 United States Attorney

20 /s/
21 MICHELLE J. KANE
22 Assistant United States Attorney